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INCOMM FINANCIAL SERVICES, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CAROLYN CLARK, et al.,
Plaintiffs,
v.
INCOMM FINANCIAL SERVICES, INC.,
Defendant.

Case No. 5:22-CV-01839-JGB-SHK

**DEFENDANT INCOMM
FINANCIAL SERVICES, INC.'S
ANSWER TO SECOND
AMENDED COMPLAINT**

Hon. Jesus G. Bernal

Second Amended Complaint Filed:
August 7, 2023

1 Defendant InComm Financial Services, Inc. (together with its affiliates,
2 “InComm”), by and through its attorneys, hereby submits its Answer and Affirmative
3 Defenses to the Second Amended Complaint (“SAC”) of Plaintiffs Carolyn Clark, et
4 al., as follows:

5 **NATURE OF THE CASE**

6 1. InComm admits it sells Vanilla®-branded prepaid physical and electronic
7 gift cards online, and that it contracts with retailers to sell physical Vanilla-branded
8 prepaid physical gift cards. InComm otherwise denies the allegations in Paragraph 1.

9 2. InComm admits that some Vanilla Gift Cards can be loaded with amounts
10 ranging from \$10 to \$500. InComm otherwise denies the allegations in Paragraph 2.

11 3. InComm denies the allegations in Paragraph 3.

12 4. InComm denies the allegations in Paragraph 4.

13 5. InComm lacks information or knowledge sufficient to admit or deny the
14 allegations in Paragraph 5.

15 6. InComm lacks information or knowledge sufficient to admit or deny the
16 allegations in Paragraph 6.

17 7. InComm denies the allegations in Paragraph 7.

18 8. InComm denies the allegations in Paragraph 8.

19 9. InComm denies the allegations in Paragraph 9.

20 10. InComm denies the allegations in Paragraph 10.

21 11. InComm denies the allegations in Paragraph 11.

22 12. InComm denies the allegations in Paragraph 12.

23 13. InComm denies the allegations in Paragraph 13.

24 14. Paragraph 14 contains legal conclusions and therefore no response is
25 required. To the extent a response is deemed required, InComm denies the allegations
26 in Paragraph 14.

27 15. InComm denies the allegations in Paragraph 15.

28 16. InComm denies the allegations in Paragraph 16.

1 in Paragraph 25.

2 26. Paragraph 26 contains legal conclusions and therefore no response is
3 required. To the extent a response is deemed required, InComm denies the allegations
4 in Paragraph 26.

5 27. Given the vagueness of the phrase “gift Cards that are the subject of this
6 Complaint,” InComm lacks information or knowledge sufficient to admit or deny the
7 allegations in Paragraph 27.

8 28. Paragraph 28 contains legal conclusions and therefore no response is
9 required. To the extent a response is deemed required, InComm denies the allegations
10 in Paragraph 28.

11 **STATEMENT OF FACTS**

12 29. InComm admits the allegations in Paragraph 29.

13 30. InComm admits the allegations in Paragraph 30.

14 31. InComm admits that purchasers of Vanilla Gift Cards pay a small
15 activation fee for each card, and otherwise denies the allegations in Paragraph 31.

16 32. InComm denies the allegations in Paragraph 32.

17 33. InComm admits that Vanilla Gift Cards may be purchased at retail stores,
18 and that in some cases the card’s face value is indicated on the card packaging.
19 InComm otherwise denies the allegations in Paragraph 33.

20 34. InComm admits that its physical cards are not loaded with monetary value
21 prior to activation.

22 35. InComm admits that its physical cards are not loaded with monetary value
23 until activation, at which point the physical cards are loaded with monetary value,
24 which may be redeemed within 24 hours of activation.

25 36. InComm lacks information or knowledge sufficient to admit or deny the
26 allegations in Paragraph 36.

27 37. InComm admits the allegations in Paragraph 37.

28 38. Paragraph 38 purports to describe the process of purchasing a Vanilla e-

1 card through www.vanillagift.com. InComm avers that the website speaks for itself
2 and otherwise denies the allegations in Paragraph 38.

3 39. InComm denies the allegations in Paragraph 39.

4 40. InComm denies the allegations in Paragraph 40.

5 41. InComm admits that e-card recipients receive a link to view and print
6 their e-cards with all associated information. InComm otherwise denies the
7 allegations in Paragraph 41.

8 42. InComm denies the allegations in Paragraph 42.

9 43. InComm denies the allegations in Paragraph 43.

10 44. Paragraph 44 purports to describe consumer ratings on a website called
11 “Sitejabber.” InComm avers that the website being described speaks for itself and
12 otherwise denies the allegations in Paragraph 44.

13 45. Paragraph 45 purports to describe consumer ratings on a website called
14 “Trustpilot.” InComm avers that the website being described speaks for itself and
15 otherwise denies the allegations in Paragraph 45.

16 46. Paragraph 46 purports to describe consumer ratings on the website
17 “Pissedconsumer.com” and from the Better Business Bureau. InComm avers that the
18 websites being described speak for themselves. InComm denies that the Better
19 Business Bureau rates its products 1.05 out of 5, as in fact the Better Business Bureau
20 has given InComm a rating of A+. InComm otherwise denies the allegations in
21 Paragraph 46.

22 47. InComm denies the allegations in Paragraph 47.

23 48. InComm denies the allegations in Paragraph 48.

24 49. InComm admits that it employs specialized packaging intended to deter
25 tampering, and avers that the referenced website speaks for itself. InComm otherwise
26 lacks information or knowledge sufficient to admit or deny the allegations in
27 Paragraph 49.

28 50. Paragraph 50 contains a statement of opinion to which no response is

1 required. To the extent a response is deemed required, InComm denies the allegations
2 in Paragraph 50.

3 51. InComm denies the allegations in Paragraph 51.

4 52. InComm denies the allegations in Paragraph 52.

5 53. InComm denies the allegations in Paragraph 53.

6 54. InComm lacks information or knowledge sufficient to admit or deny the
7 allegations in Paragraph 54.

8 55. InComm avers that the referenced website speaks for itself. InComm
9 otherwise lacks information or knowledge sufficient to admit or deny the allegations
10 in Paragraph 55.

11 56. InComm denies the allegations in Paragraph 56.

12 57. InComm denies the allegations in Paragraph 57.

13 58. InComm denies the allegations in Paragraph 58.

14 59. InComm denies the allegations in Paragraph 59.

15 60. InComm denies the allegations in Paragraph 60.

16 61. Paragraph 61 contains no factual allegations directed at InComm and
17 therefore no response is required. To the extent a response is deemed required,
18 InComm lacks information or knowledge sufficient to admit or deny the allegations
19 in Paragraph 61.

20 62. InComm admits that physical gift cards have value only upon activation,
21 and that electronic gift cards have value only after the card link is transmitted to the
22 recipient. InComm otherwise denies the allegations in Paragraph 62.

23 63. InComm denies the allegations in Paragraph 63.

24 64. Paragraph 64 purports to provide a physical representation of
25 <https://balance.vanillagift.com/#/>. InComm avers that that website speaks for itself.
26 To the extent a response is deemed required, InComm denies that the screenshot
27 contained in Paragraph 64 fully captures what its website “looks like.”

28 65. InComm denies the allegations in Paragraph 65.

1 66. InComm admits that a card is not loaded with monetary value prior to
2 activation, and otherwise denies the allegations in Paragraph 66.

3 67. InComm denies the allegations in Paragraph 67.

4 68. InComm denies the allegations in Paragraph 68.

5 69. InComm denies the allegations in Paragraph 69.

6 70. InComm denies the allegations in Paragraph 70.

7 71. Paragraph 71 contains no factual allegations directed at InComm, and
8 therefore no response is required. To the extent a response is deemed required,
9 InComm lacks information or knowledge sufficient to admit or deny the allegations
10 in Paragraph 71.

11 72. Paragraph 72 contains no factual allegations directed at InComm, and
12 therefore no response is required. To the extent a response is deemed required,
13 InComm lacks information or knowledge sufficient to admit or deny the allegations
14 in Paragraph 72.

15 73. InComm admits the existence of online security tools to deter access to
16 websites by automated computer programs. InComm further avers that the
17 Wired.com article cited in Paragraph 73 speaks for itself. InComm otherwise lacks
18 information or knowledge sufficient to admit or deny the allegations in Paragraph 73.

19 74. InComm admits the existence of the cybersecurity tool CAPTCHA.
20 InComm denies that CAPTCHA functions only by requiring users to solve visual
21 puzzles. InComm otherwise lacks information or knowledge sufficient to admit or
22 deny the allegations in Paragraph 74.

23 75. InComm denies the allegations in Paragraph 75.

24 76. InComm admits that it is aware of and employs versions of CAPTCHA.
25 InComm otherwise denies the allegations in Paragraph 76.

26 77. InComm denies the allegations in Paragraph 77.

27 78. InComm denies that it does not maintain a phone system for checking
28 card balances. InComm further denies that such systems are impervious to criminal

1 intervention or otherwise preferable to websites. Paragraph 78 otherwise contains
2 allegations not directed at InComm that InComm lacks information or knowledge
3 sufficient to admit or deny.

4 79. InComm denies the allegations in Paragraph 79.

5 80. InComm denies that it does not monitor Card numbers for balance
6 checking prior to activation, and otherwise denies the allegations in Paragraph 80.

7 81. InComm denies the allegations in Paragraph 81.

8 82. InComm denies the allegations in Paragraph 82.

9 83. InComm denies the allegations in Paragraph 83.

10 84. InComm denies the allegations in Paragraph 84.

11 85. InComm denies the allegations in Paragraph 85.

12 86. InComm denies the allegations in Paragraph 86.

13 87. InComm admits that some of its Vanilla Gift Cards contain the statements
14 “IF TAMPER EVIDENT, DO NOT PURCHASE;” and “[f]or security purposes,
15 please check that the underlined portion of the number matches the number below.”
16 InComm otherwise denies the allegations in Paragraph 87.

17 88. InComm denies the allegations in Paragraph 88.

18 89. InComm denies the allegations in Paragraph 89.

19 90. Paragraph 90 purports to describe InComm’s website. InComm avers that
20 the website speaks for itself. InComm otherwise denies the allegations in Paragraph
21 90.

22 91. InComm denies the allegations in Paragraph 91.

23 92. InComm denies the allegations in Paragraph 92.

24 93. InComm denies the allegations in Paragraph 93.

25 94. InComm denies the allegations in Paragraph 94.

26 95. InComm denies that Plaintiffs Clark or Stewart contacted its customer
27 service department at any time. InComm further denies giving consumers “the
28 runaround.” InComm otherwise lacks information or knowledge sufficient to admit

1 or deny the allegations in Paragraph 95.

2 96. InComm denies the allegations in Paragraph 96.

3 97. InComm denies the allegations in Paragraph 97.

4 98. InComm denies the allegations in Paragraph 98.

5 **CLASS ALLEGATIONS**

6 99. Paragraph 99 contains no factual allegations directed to InComm, and
7 therefore no response is required. To the extent a response is deemed required,
8 InComm denies the allegations in Paragraph 99.

9 100. Paragraph 100 contains no factual allegations directed to InComm, and
10 therefore no response is required.

11 101. Paragraph 101 contains legal conclusions and therefore no response is
12 required. To the extent a response is deemed required, InComm denies the allegations
13 in Paragraph 101.

14 102. Paragraph 102 contains legal conclusions and therefore no response is
15 required. To the extent a response is deemed required, InComm denies the allegations
16 in Paragraph 102.

17 103. Paragraph 103 contains legal conclusions and therefore no response is
18 required. To the extent a response is deemed required, InComm denies the allegations
19 in Paragraph 103.

20 104. Paragraph 104 contains legal conclusions and therefore no response is
21 required. To the extent a response is deemed required, InComm denies the allegations
22 in Paragraph 104.

23 105. Paragraph 105 contains legal conclusions and therefore no response is
24 required. To the extent a response is deemed required, InComm denies the allegations
25 in Paragraph 105.

26 106. Paragraph 106 contains legal conclusions and therefore no response is
27 required. To the extent a response is deemed required, InComm denies the allegations
28 in Paragraph 106.

108. Paragraph 108 contains legal conclusions and therefore no response is required. To the extent a response is deemed required, InComm denies the allegations in Paragraph 108.

10 109. InComm incorporates its responses and denials to all the foregoing
11 allegations in response to Paragraph 109.

111. Paragraph 111 contains legal conclusions and therefore no response is required. To the extent a response is deemed required, InComm denies the allegations in Paragraph 111.

113. Paragraph 113 contains legal conclusions and therefore no response is required. To the extent a response is deemed required, InComm denies the allegations in Paragraph 113.

24 114. InComm denies the allegations in Paragraph 114.

26 116. InComm denies the allegations in Paragraph 116.

28 118. InComm denies the allegations in Paragraph 118.

1 119. InComm denies the allegations in Paragraph 119.

2 120. InComm denies the allegations in Paragraph 120.

3 121. Paragraph 121 contains no allegations directed to InComm, and therefore
4 no response is required.

5 **SECOND CLAIM**

6 **(Violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code**
7 **§§ 17200, *et seq.*—Unlawful Business Practices)**

8 122. InComm incorporates its responses and denials to all the foregoing
9 allegations in response to Paragraph 122.

10 123. Paragraph 123 contains legal conclusions and therefore no response is
11 required. To the extent a response is deemed required, InComm denies the allegations
12 in Paragraph 123.

13 124. Paragraph 124 contains legal conclusions and therefore no response is
14 required. To the extent a response is deemed required, InComm avers that Cal. Bus.
15 & Prof. Code § 17201, *et seq.*, speaks for itself.

16 125. InComm denies the allegations in Paragraph 125.

17 126. InComm denies the allegations in Paragraph 126.

18 127. InComm denies the allegations in Paragraph 127.

19 128. InComm denies the allegations in Paragraph 128.

20 129. InComm denies the allegations in Paragraph 129.

21 130. Paragraph 130 contains no factual allegations directed to InComm, and
22 therefore no response is required. To the extent a response is deemed required,
23 InComm lacks information or knowledge sufficient to admit or deny the allegations
24 in Paragraph 130.

25 131. Paragraph 131 contains allegations not directed to InComm, and therefore
26 no response is required. To the extent a response is deemed required, InComm denies
27 the allegations in Paragraph 131.

28 132. Paragraph 132 contains allegations not directed to InComm, and therefore

1 no response is required. To the extent a response is deemed required, InComm denies
2 the allegations in Paragraph 132.

3 133. InComm denies the allegations in Paragraph 133.

4 134. InComm denies the allegations in Paragraph 134.

5 135. Paragraph 135 contains allegations not directed to InComm, and therefore
6 no response is required. To the extent a response is deemed required, InComm denies
7 the allegations in Paragraph 135.

8 136. InComm denies the allegations in Paragraph 136.

9 **THIRD CLAIM**

10 **(Violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code**
11 **§§ 17200, *et seq.*—Unfair Business Practices)**

12 137. InComm incorporates its responses and denials to all the foregoing
13 allegations in response to Paragraph 137.

14 138. InComm denies the allegations in Paragraph 138.

15 139. InComm denies the allegations in Paragraph 139.

16 140. InComm denies the allegations in Paragraph 140.

17 141. Paragraph 141 contains legal conclusions and therefore no response is
18 required. To the extent a response is deemed required, InComm avers that Cal. Civ.
19 Code § 1798.100(e) speaks for itself. InComm otherwise denies the allegations in
20 Paragraph 141.

21 142. InComm denies the allegations in Paragraph 142.

22 143. Paragraph 143 contains allegations not directed to InComm, and therefore
23 no response is required. To the extent a response is deemed required, InComm denies
24 the allegations in Paragraph 143.

25 144. InComm denies the allegations in Paragraph 144.

26 145. Paragraph 145 contains allegations not directed to InComm, and therefore
27 no response is required. To the extent a response is deemed required, InComm denies
28 the allegations in Paragraph 145.

1 146. Paragraph 146 contains no allegations directed to InComm, and therefore
2 no response is required. To the extent a response is deemed required, InComm avers
3 that the California Business and Professions Code Section 17200 and the California
4 Code of Civil Procedure Section 1021.5 speak for themselves.

5 **FOURTH CLAIM**

6 **(Violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code**
7 **§§ 17200, *et seq.*—Unfair Business Practices)**

8 147. InComm incorporates its responses and denials to all the foregoing
9 allegations in response to Paragraph 147.

10 148. InComm denies the allegations in Paragraph 148.

11 149. InComm denies the allegations in Paragraph 149.

12 150. Paragraph 150 contains legal conclusions and therefore no response is
13 required. To the extent a response is deemed required, InComm avers that Cal. Civ.
14 Code § 1798.100(e) speaks for itself. InComm otherwise denies the allegations in
15 Paragraph 150.

16 151. InComm denies the allegations in Paragraph 151.

17 152. InComm denies the allegations in Paragraph 152.

18 153. Paragraph 153 contains allegations not directed to InComm, and therefore
19 no response is required. To the extent a response is deemed required, InComm denies
20 the allegations in Paragraph 153.

21 154. Paragraph 154 contains legal conclusions and therefore no response is
22 required. To the extent a response is deemed required, InComm denies the allegations
23 in Paragraph 154.

24 **FIFTH CLAIM**

25 **(Unjust Enrichment)**

26 155. InComm incorporates its responses and denials to all the foregoing
27 allegations in response to Paragraph 155.

28 156. InComm denies the allegations in Paragraph 156.

1 157. InComm denies the allegations in Paragraph 157.

2 158. InComm denies the allegations in Paragraph 158.

3 159. InComm denies the allegations in Paragraph 159.

4 160. InComm denies the allegations in Paragraph 160.

5 161. InComm denies the allegations in Paragraph 161.

6 **PRAYER FOR RELIEF AND JURY DEMAND**

7 InComm denies that Plaintiffs and/or any of the putative class members are
8 entitled to relief, including, but not limited to, the relief sought in Plaintiffs' Prayer
9 for Relief and Jury Trial Demand. InComm specifically denies that any class or
10 classes can or should be certified. InComm also specifically denies that Plaintiffs are
11 entitled to a trial by jury on their claims for equitable relief.

12 **AFFIRMATIVE DEFENSES**

13 InComm sets forth below its affirmative defenses. By setting forth these
14 affirmative defenses, InComm does not assume the burden of proving any fact, issue,
15 or element of a cause of action where such burden properly belongs to Plaintiffs.
16 Moreover, nothing stated herein is intended or should be construed as an
17 acknowledgement that any particular issue or subject matter necessarily is relevant to
18 Plaintiffs' allegations.

19 **FIRST AFFIRMATIVE DEFENSE**

20 **(Preemption)**

21 The claims in the SAC are barred, in whole or in part, because they are
22 preempted by federal law.

23 **SECOND AFFIRMATIVE DEFENSE**

24 **(Primary / Exclusive Jurisdiction)**

25 The claims in the SAC are barred, in whole or in part, by the doctrines of
26 primary and/or exclusive regulatory agency jurisdiction.

1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Safe Harbor)**

3 The claims in the SAC are barred, in whole or in part, by California's safe
4 harbor doctrine because InComm's conduct, at all relevant times and places, was in
5 compliance with applicable law.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Lack of Article III and Statutory Standing)**

8 Plaintiffs' and putative class members' claims are barred, in whole or in part,
9 by lack of standing and failure to establish any cognizable injury traceable to
10 InComm's conduct and redressable by a court order.

11 **FIFTH AFFIRMATIVE DEFENSE**

12 **(Speculative or Uncertain Damages)**

13 Plaintiffs fail to and cannot prove money damages with any degree of certainty
14 sufficient to permit recovery of damages.

15 **SIXTH AFFIRMATIVE DEFENSE**

16 **(No Injunctive Relief)**

17 To the extent Plaintiffs and/or members of the asserted putative class seek
18 injunctive relief, they lack Article III standing to pursue such relief in part because
19 they cannot show substantial and immediate irreparable injury—that is, any real or
20 immediate threat that they will be wronged again.

21 Additionally, Plaintiffs and/or members of the asserted putative class are not
22 entitled to injunctive relief because they cannot show that (1) they have suffered
23 irreparable harm sufficient to warrant injunctive relief; (2) remedies available at law
24 are inadequate; (3) the balance of hardships between the parties warrants an equitable
25 remedy; and (4) the public interest favors injunctive relief.

26 **SEVENTH AFFIRMATIVE DEFENSE**

27 **(Laches)**

28 Plaintiffs' and the putative class members' claims are barred, in whole or in

1 part, by the doctrine of laches.

2 **EIGHTH AFFIRMATIVE DEFENSE**

3 **(Adequate Remedy at Law)**

4 Plaintiffs' and putative class members' equitable claims are barred, in whole or
5 in part, to the extent there is an adequate remedy at law.

6 **NINTH AFFIRMATIVE DEFENSE**

7 **(No Duty to Disclose)**

8 Plaintiffs' and putative class members' claims are barred, in whole or in part,
9 because InComm was not under a legal duty to disclose the allegedly omitted facts.

10 **TENTH AFFIRMATIVE DEFENSE**

11 **(No Class Action)**

12 To the extent Plaintiffs seek to certify a class action, Plaintiffs have failed to
13 satisfy the requirements set forth in Fed. R. Civ. P. 23.

14 **ELEVENTH AFFIRMATIVE DEFENSE**

15 **(Voluntary Payment)**

16 The claims in the SAC are barred by the voluntary payment doctrine.

17 **TWELFTH AFFIRMATIVE DEFENSE**

18 **(Statute of Limitations or Repose)**

19 The claims in the SAC are barred, in whole or in part, by the applicable statutes
20 of limitations or repose.

21 **THIRTEENTH AFFIRMATIVE DEFENSE**

22 **(Equity)**

23 The claims in the SAC are barred, in whole or in part, by principles of equity.

24 **FOURTEENTH AFFIRMATIVE DEFENSE**

25 **(California Civil Code § 1781)**

26 To the extent Plaintiffs seek to certify a class action based on alleged violations
27 of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code, § 1750, *et seq.*,
28 they have failed to satisfy the requirements set forth in California Civil Code § 1781.

1 **FIFTEENTH AFFIRMATIVE DEFENSE**

2 **(California Civil Code § 1782)**

3 To the extent Plaintiffs and putative class members seek damages for alleged
4 violations of the CLRA, they have failed to satisfy the prerequisites set forth in
5 California Civil Code § 1782.

6 **SIXTEENTH AFFIRMATIVE DEFENSE**

7 **(California Civil Code § 1784)**

8 To the extent Plaintiffs and putative class members allege violations of the
9 CLRA, InComm has a complete defense under California Civil Code § 1784.

10 **SEVENTEENTH AFFIRMATIVE DEFENSE**

11 **(Cal. Bus. & Prof. Code § 17200, *et seq.*)**

12 Plaintiffs' claims under the Unfair Competition Law ("UCL"), Business and
13 Professions Code § 17200, *et seq.*, are barred or limited, in whole or in part, by the
14 terms of the UCL, or otherwise, and InComm is entitled to the defenses set forth
15 therein.

16 **EIGHTEENTH AFFIRMATIVE DEFENSE**

17 **(Waiver)**

18 Plaintiffs' and putative class members' claims are barred, in whole or in part,
19 by the doctrine of waiver.

20 **NINETEENTH AFFIRMATIVE DEFENSE**

21 **(Arbitration)**

22 Plaintiffs' and putative class members' claims are barred, in whole or in part,
23 to the extent that they must be arbitrated or are subject to a class-action waiver.

24 **RESERVATION OF ADDITIONAL DEFENSES**

25 InComm reserves the right to raise any additional defenses, affirmative or
26 otherwise, and any counterclaims which may become apparent through discovery in
27 the course of this action. InComm further reserves all legal defenses that it may have
28 against the putative class and against each member of the putative class.

WHEREFORE, InComm requests that judgment be entered in its favor and against Plaintiffs; that the Court find that this suit cannot be maintained as a class action; and that InComm be awarded its costs, attorneys' fees, and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: January 10, 2024

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